No. 5713

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of the Estate of EDNA G. MILENS,
Appellant

vs.

EDNA G. MILENS,
Appellee

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for District of Oregon.

COAN & ROSENBERG,
710 Pittock Block, Portland, Oregon,
Attorneys for Appellant.
JAMES M. McMENAMIN,
Selling Building, Portland, Oregon.
Attorney for Appellee.

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Appellant

vs.

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

At the outset appellant deems it necessary to inform the court that the appeal in this cause is practically identical to the appeal in the case entitled No. 5500, United States Circuit Court of Appeals, for the Ninth Circuit, George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant, vs. Edna G. Milens, Appellee.

The appeal in case No. 5500 resulted in an opinion filed October 8, 1928 reversing the District Court of the United States for the District of Oregon and upon which a mandate was filed on the 8th day of November, 1928 over the signature of Paul P. O'Brien, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; and was spread upon the records of the District Court of the United States for the District of Oregon on the 16th day of November, 1928. (Transcript of Record, page 3).

The facts in the former appeal which appear more fully in the brief of the appellant in case No. 5500 United States Circuit Court of Appeals for the Ninth Circuit are herein set forth briefly as follows:

Edna G. Milens was adjudged a bankrupt on December 3, 1926. On June 23, 1927, George P. Clark, her trustee in bankruptcy, filed a petition praying that an order be made requiring the bankrupt to forthwith deliver and pay over to him, as trustee in

bankruptcy of her estate the sum of $5,377.37 wilfully and intentionally concealed by her from the said trustee in bankruptcy.

On July 22, 1927, based upon a hearing before Hon. A. M. Cannon, Referee in Bankruptcy on said petition, an order was made and entered by said referee requiring said Edna G. Milens, bankrupt, to account for and pay over to George P. Clark, trustee in bankruptcy of her estate, on or before five days from the date of said order, the sum of $5377.37 belonging to said estate, and which amount she had in her possession and under her control at said time and which was being fraudulently concealed from her said trustee. (Transcript of Record, page 1).

At said time, namely, on July 22, 1927, findings of fact were made and entered by said Referee, A. M. Cannon, which findings in effect stated that the sum of $5377.37 was in the possession of the bankrupt at the date of the adjudication in bankruptcy and was concealed by said bankrupt from her trustee

in bankruptcy at the date of the making of said findings; further that the said bankrupt, Edna G. Milens, had in her possession on July 22, 1927, the sum of $5377.37 which she failed and refused to account for or pay over to her trustee; and further that said sum was knowingly, fraudulently and wilfully concealed by said bankrupt from her trustee.

No appeal or review was taken from said findings of the referee or from the order thereon.

On August 24, 1927, said referee filed a certificate in the District Court of the United States, for the District of Oregon, stating the fact that said bankrupt was in contempt for failure to obey said order and recommended that she be punished for said contempt.

On March 17, 1928, an order was entered in the District Court of the United States for the District of Oregon requiring Edna G. Milens, bankrupt, to show cause why she should not be punished for contempt for failure to obey Referee's order dated July 22, 1927.

On March 26, 1928 there was filed in the District Court of the United States for the District of Oregon an answer by the bankrupt to the order to show cause. Said answer among other things merely stated that she submits herself to the said court, and throws herself wholly and completely upon its mercy.

On March 26, 1928, a hearing was had before the District Court of the United States for the District of Oregon in compliance with said show cause order but the bankrupt did not take the stand, offered no testimony, made no showing as to the reason for her failure to obey the referee's order.

Thereafter and on April 28, 1928, Hon. R. S. Bean, District Judge, entered an order purging the bankrupt of her contempt. (Transcript of Record, page 2.)

From said order of the District of the United States for the District of Oregon, dated April 28, 1928, an appeal was taken to this appellate tribunal. Said appeal was pre-

sented in the usual manner and on October 8, 1928, an opinion was entered by this court reversing the United States District Court for the District of Oregon with directions to take further proceedings not out of harmony with said opinion. Based upon said opinion, a mandate was entered by this court on the 8th day of November, 1928, and spread upon the records of the District Court of the United States for the District of Oregon on November 16, 1928.

On December 11, 1928, there was filed in the District Court of the United States for the District of Oregon, a citation requiring Edna G. Milens, bankrupt, to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth Circuit, dated October 8, 1928, based upon the order of the Referee dated July 22, 1927, requiring said Edna G. Milens to account for and pay over to George P. Clark, her trustee in bankruptcy, the sum of $5377.37. (Transcript of Record, page 6).

On December 17, 1928, Edna G. Milens, bankrupt, filed an answer to said citation dated December 11, 1928. (Transcript of Record, page 6).

On December 17, 1928, Edna G. Milens, bankrupt, filed an answer to said citation dated December 11, 1928. (Transcript of Record, page 8), alleging substantially the same allegations as contained in the answer originally filed by her dated March 26, 1928.

On December 19, 1928, the appellant filed a motion to strike out the answer filed December 17, 1928 by the bankrupt on the ground and for the reason that the answer to the original citation requiring Edna G. Milens to show cause why she should not be adjudged guilty of contempt was filed in the District Court of the United States for the District of Oregon on March 26, 1928, and the answer dated December 17, 1928 is an answer to the original show cause order in the same proceeding dated March 17, 1928, being the only contempt proceeding in this

matter before the District Court of the United States for the District of Oregon. (Transcript of Record, page 14).

On January 2, 1929, Hon. R. S. Bean, District Judge of the District Court of the United States for the District of Oregon, rendered an oral opinion: (Transcript of Record, page 16), after a hearing on the contempt proceeding based upon the citation dated December 11, 1928. Said opinion indicates that the former hearing upon which the order of April 28, 1928 was made (Transcript of Record, page 2) differed from the hearing that resulted in the order upon which this appeal is predicated in that on the first contempt proceeding the District Court, without hearing any testimony by the bankrupt or on the bankrupt's behalf, dismissed the proceedings. Whereas, on the present hearing, the bankrupt appeared and testified as a witness under oath that she did not have any money belonging to the estate at the time the order was made or since and that she has no money or property with which to make the payment

and is unable to comply with the order. No other testimony was offered by the bankrupt.

January 11, 1929 Hon. R. S. Bean, Judge of the District Court of the United States for the District of Oregon, entered an order based upon said opinion commanding that the contempt proceedings instituted against said bankrupt, Edna G. Milens, be dismissed with prejudice. (Transcript of Record, page 19).

This appeal is taken from said order.

SPECIFICATIONS OF ERRORS RELIED UPON

THE FIRST ERROR ALLEGED is the failure of the District Court of the United States for the District of Oregon to make and enter an order upon the citation dated December 11, 1928, requiring Edna G. Milens, bankrupt, to appear and show cause why she should not be punished for contempt as provided in the opinion of the United States Circuit Court of Appeals for the Ninth District

filed in said court in this cause on the 8th day of October, 1928, which said opinion reversed the order of the District Court of the United States for the District of Oregon dated April 28, 1928, purging the bankrupt of contempt, and, upon which opinion of the United States Circuit Court of Appeals for the Ninth Circuit, a mandate was entered and filed and spread upon the records of the District Court of the United States for the District of Oregon on the 16th day of November, 1928.

THE SECOND ERROR ALLEGED is the making and entering of an order by the District Court of the United States for the District of Oregon dismissing with prejudice the contempt proceedings against the bankrupt, Edna G. Milens, without any testimony on behalf of Edna G. Milens, bankrupt, showing the disposition or disappearance of the sum of $5377.37 which sum the Referee in Bankruptcy found she had in her possession on the 22nd day of July, 1927, and which sum said bankrupt was fraudulently and wilfully concealing from her trustee upon which find-

ings an order dated July 22, 1927 by the Referee was entered requiring said Edna G. Milens, bankrupt, to turn over said sum of $5377.37, then in her possession, and wilfully and fraudulently concealed by her to George P. Clark, her trustee in bankruptcy and which findings and order has never been reviewed, appealed, vacated, modified or reversed.

POINTS AND AUTHORITIES

I

THE OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT REVERSING THE ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON DATED APRIL 28, 1928, PURGING THE BANKRUPT OF CONTEMPT FOR FAILURE TO COMPLY WITH THE REFEREE'S ORDER DATED JULY 22, 1927, AND DIRECTING THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON TO TAKE FURTHER PROCEEDINGS NOT OUT OF HARMONY WITH

SAID OPINION AND WHICH OPINION STATED THAT EDNA G. MILENS, BANKRUPT, HAD FAILED TO PLEAD CONDITIONS OR CAUSES IN HER ANSWER TO THE CONTEMPT PROCEEDINGS ADEQUATE OR SUFFICIENT TO WARRANT HER BEING PURGED OF CONTEMPT MADE IT MANDATORY UPON THE DISTRICT COURT TO COMMIT SAID BANKRUPT FOR CONTEMPT.

George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant vs. Edna G. Miiens, Appellee, Case No. 5500, United States Circuit Court of Appeals for the Ninth Circuit, Opinion filed October 8, 1928.

II

THE BURDEN OF PROOF IN THE HEARING ON THE CONTEMPT PROCEEDING WAS UPON THE BANKRUPT TO SATISFACTORILY ACCOUNT TO THE DISTRICT COURT FOR THE DISPOSITION OF THE ASSETS BY HER SINCE THE DATE OF THE REFEREE'S ORDER AND SHE CANNOT ESCAPE AN ORDER FOR COM-

MITTAL BY SIMPLY DENYING UNDER OATH, IN HER SWORN ANSWER TO THE RULE TO SHOW CAUSE, THAT SHE HAS ANY ASSETS OR BY TESTIMONY THAT SHE DID NOT HAVE ANY MONEY BELONGING TO THE ESTATE AT THE TIME THE REFEREE'S ORDER WAS MADE, OR SINCE, AND THAT SHE HAS NO MONEY OR PROPERTY WITH WHICH TO MAKE PAYMENT AS PROVIDED BY THE ORDER.

George P. Clark, Trustee in Bankruptcy of the Estate of Edna G. Milens, Appellant vs. Edna G. Milens, Appellee, Case No. 5500, United States Circuit Court of Appeals for the Ninth Circuit, Opinion filed October 8, 1928.

In re Frankel (U.S.D.C.N.Y. So. Dis. 1911) 25 Am. B. R. 920, 922; 184 Fed. 539.

In re Weber Co. (U.S.C.C.A. 2nd Cir. 1912) 29 Am. B. R. 217, 219; 200 Fed. 404.

1 Collier on Bankruptcy (13 Ed.) page 996, Sec. 41.

1 Collier on Bankruptcy (13 Ed.) page 993, Sec. 41.

In re Meier (C.C.A. 8th Cir. 1910) 25 Am. B. R. 272, 275; 182 Fed. 799.

In re Deuell (U.S.D.C. Wes. Dis. Mo.

1900) 4 Am. B. R. 60, 62; 100 Fed. 633.

In Dittman v. Michelson (U.S.C.C.A. 3rd Cir. 1922) 48 Am. B. R. 639, 643; 281 Fed. 116.

In re Power v. Fuhrman (U.S.C.C.A. 9th Cir. 1915) 34 Am. B. R. 418, 421; 22 Fed. 787.

In re the matter of George Shelly (U. S.D.C. So. Dis. Calif. 1925) 6 Am. B. R. (N.S.) 491, 494; 8 Fed. (2nd) 878.

In re Magen Co. Inc. (U.S.C.C.A. 2nd Cir. 1925) 7 Am. B. R. (N.S.) 283, 288; 10 Fed. (2nd) 91.

In Reardon vs. Pensaneau (U.S.C.C.A. 8th Cir. 1927) 9 Am. B. R. (N.S.) 519, 520; 18 Fed. (2nd) 244.

ARGUMENT

The appellant has already shown in his statement of the case in this brief that this appeal is practically identical to the questions that were raised in the appeal between the same parties herein in case No. 5500 in the United States Circuit Court of Appeals for the Ninth Circuit. Accordingly, appellant respectfully directs the Court's attention to the Transcript of Record, Brief of Appellant,

Brief of Appellee, and the Opinion and Mandate thereon in the former appeal. This refrence is requested for the purpose of condensing the argument and citations herein and thereby reducing the expense of a voluminous brief herein to the bankrupt estate.

The errors in the former appeal differ from the errors herein in that the former appeal was based upon the following:

First: The failure of the District Court of the United States for the District of Oregon to accept and adopt the findings and order of the Referee based thereon, and

Second: The making of an order by the District Court of the United States for the District of Oregon purging the bankrupt of contempt although the bankrupt offered no testimony and made no showing and called no witnesses in the contempt proceeding.

The errors relied upon herein are namely:

First: That based upon the opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the former appeal,

an order should have been entered committing the bankrupt for contempt, and

Second: That error was committed by the District Court of the United States for the District of Oregon in purging the bankrupt of contempt with prejudice without any showng by the bankrupt or on her behalf as to the disposition made by her of the assets found to be in her possession by the Referee, which assets the bankrupt was wilfully and fraudulently concealing from her trustee.

Hence, there is one marked difference between this appeal and the former appeal. At the hearing on the first contempt proceeding the bankrupt did not take the stand and called no witnesses so accordingly made no showing as to why she should not be punished for contempt. At the second hearing on the contempt proceeding after the reversal of the former order purging the bankrupt of contempt, she did offer testimony by stating under oath that she did not have any money belonging to the estate at the time the Ref-

eree's order was made, or since, and that she did not then have any money or property to make payment as provided by the order and was wholly unable to do so. (Transcript of Record, Opinion of Hon. R. S. Bean, District Judge, page 16, paragraph 2 thereof).

The bankrupt filed an answer to the original show cause proceeding. Said answer contained no material allegation in answer to the show cause proceeding and the only allegation that could be considered as even relating to the subject was couched in the following language:

> "Said bankrupt further alleges that she is wholly and completely financially embarrassed and has been for some time past physically disabled."

The bankrupt's second answer filed in answer to the citation dated December 11, 1928, upon which the second contempt proceeding was based, contained some changes but set forth no new or material allegation as effecting the proceeding under consideration and contained the same language as in

the former answer herein before quoted.

The opinion of this appellate court in the former appeal, case No. 5500, determined that the allegation above quoted as contained in the bankrupt's answer to the original contempt proceeding was insufficient. This Court, speaking through C. J. Dietrich, Circuit Judge, said as follows:

> "The record and the bankrupt's admission that she had not complied with the order made a prima facie case of contempt. She could purge herself of the charge by showing that for sufficient reasons, she was unable to obey, but the burden was upon her, by appropriate pleadings and evidence, to make that showing. She not only failed circumstantially or adequately to plead such conditions or causes, but she produced no evidence at all explanatory of her default. Both upon principle and the great weight of authority, we think her showing insufficient."

Therefore, since the first answer was insufficient and the second answer contained no new allegations it must follow that it, too, was insufficient. Accordingly, the District Court of the United States for the District of

Oregon should have entered an order on the citation dated December 11, 1928 based upon the opinion of this Court committing the bankrupt for contempt as it is axiomatic that the bankrupt could only be purged of contempt upon proof of the allegations contained in her answer and if there are no allegations sufficient in law to excuse her delict commitment should have followed as a matter of law.

The District Court of the United States for the District of Oregon in its opinion dated January 2, 1928 upon the second contempt proceeding, clearly stated the position of appellant in the following language:

> "It is agued that because the Referee found that the bankrupt had in her possession the money at the time of the adjudcation and that order stands unreversed or unmodified, it must be assumed conclusively that she had the money at the time the order was made, and that she can purge herself from contempt only by showing what disposition she has made of the money, whether in fact she had it or not, or regardless of her present ability to comply with the order, but I do not so

understand the law." (Transcript of Record, page 17).

That is the argument of appellant. However, the District Court of the United States for the District of Oregon is in error as to the law applying to such a situation. The law is amply set forth in the Brief of Appellant on the former appeal.

This Court has in its opinion on the former appeal in this case stated the rule as contended by appellant:

> "But at the threshold of any inquiry the turn-over order must be assumed to have been correct and the presumption of continuing ability to comply must prevail until the defendant satisfies the Court that it no longer exists."

Hence, the deduction is irresistible that if the ability of the bankrupt to comply continues until the contrary is shown, such a showing would not be inability to comply. The proof would have to show the facts that occurred that removed the ability and not that there was no ability. The only showing made by the bankrupt on the second hearing

was to the effect that she never had the ability to comply. This Court said she is judicially estopped from so asserting. The contempt could only be purged by satisfying the Court as to subsequent conditions that removed her ability to comply. There was no allegation or testimony of such conditons.

Accordingly, the appellant submits that the District Court of the United States for the District of Oregon committed error when it refused to enter the order prayed for in the citation dated December 11, 1928, adjudging the bankrupt guilty of contempt of Court and committing her by imprisonment by the United States Marshal of the District of Oregon for failure to comply with the lawful order of Hon. A. M. Cannon, Referee in Bankruptcy, dated July 22, 1927.

The following authorities unequivocably state the rule as contended by the appellant, namely, that the showing on the contempt proceeding must cover disposition of the assets since the date of the order and not the inability to comply with the order.

1 Collier on Bankruptcy, (13th Ed.) page 996, Section 41, states the rule as follows:

> "Upon a motion to punish a bankrupt for contempt because of his refusal to obey the order of the referee directing him to turn over certain property to his trustee, the only question at issue is the disposition of the property by the bankrupt since the date of the order; the bankrupt is estopped from denying that he was in possession of the property directed to be turned over."

1 Collier on Bankruptcy (13th Ed.), page 993, Section 41, states the rule as follows:

> "Property of a bankrupt estate, traced to the recent control or possession of the bankrupt, or a third person is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate."

In re Meier (C.C.A. 8th Cir. 1910) 25 Am. B. R. 272, 275; 182 Fed. 799, is very similar to the situation at bar in that the bankrupt on a similar hearing to the one under consideration, took the witness stand and stated, as the

bankrupt did in the instant case, that he did not have any property and failed to show any disposition of the money. The Court said:

> "But the settled rule is that, when property of a bankrupt estate is traced to the possession of one who receives it upon the eve of bankruptcy of its owner, it is presumed that it remains in his possession or under his control until he satisfactorily accounts to the court of bankruptcy for its disposition or disappearance; that the burden is upon him to satisfactorily so account for it; and that he cannot escape an order for its surrender by simply denying under oath that he has it, or that it is the property of the bankrupt estate. Mueller v. Nugent, 184 U. S. 1, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405; Boyd v. Glucklich (C.C.A., 8th Cir.), 8 Am. B. R. 393. 116 Fed. 135, 143, 53 C. C. A. 451; Schweer v. Brown (C.C.A. 8th Cir.) 12 Am. B. R. 178, 130 Fed. 328, 64 C. C. A. 574; In re Salkey, 21 Fed. Cas. Nos. 12,253 and 12,254."

In re Frankel (U.S.D.C.N.Y. So. Dis. 1911); 25 Am. B. R. 920, 922; 184 Fed. 539, District Judge Hand in speakng for the Court said:

> "In addition, it is of much authoritative weight that it has undoubtedly been the practice in this district to treat such

orders as conclusive estoppels upon the date of their entry, and to leave open to the respondent only the issue of showing what he has done with the money since that time."

In re Weber Co. (U.S.C.C.A. 2nd Cir. 1912) 29 Am. B. R. 217, 219; 200 Fed. 404, the court said:

"Upon the application to punish for contempt he made no explanation as to how or why it was that this particular sum had disappeared, merely denying that he ever had it. His statement that he had no money, when the proceedng for contempt was instituted, without some such explanation was insufficient and the judge quite properly held him on contempt for not paying it over. To excuse disobedience of the order by such general denial would make it easy to evade the requirements of the Bankruptcy Act."

In the Matter of George Shelley (U.S.D.C. So. Dis. of Calif. 1925) 6 Am. B. R. (N.S.) 491, 493; 8 Fed. (2nd) 878, the court said:

"If that order is not now reviewable by this court, then the only thing to be tried on this proceeding is the question of the disposition of this money by the bankrupt and his sons, since the time of the

order made by the referee. At the hearing there was no effort or attempt on the part of the persons charged to do this. Their position simply was that they never received the money in question and are now not in possession of it. The assertion of present inability to turn over, without further explanation, apparently does not furnish any evidence of what has become of it."

In re Dittman vs. Michelson (U.S.C.C.A. 3rd Cir. 1922), 48 Am. B. R. 639, 643; 281 Fed. 116, the court said:

"The orders to turn over being proper, the assets being presumptively in the bankrupt's possession, it will now be for him, in the subsequent proceeding, to show how and when they passed out of his possession. If the fear of incriminating himself prevents him from disclosing what he has done with such assets, that is an unfortunate situation, which the bankrupt has brought on himself; but it nevertheless leaves the case without any explanation by him of what he is now called upon to explain, namely, what he has done with the assets."

In Power vs. Fuhrman, (U.S.C.C.A., 9th Cir. 1915), 34 Am. B. R. 418, 421; 22 Fed. 787, the court said:

> "Equally plain is it that the burden is upon the delinquent who claims to be incaple of making the delivery decreed, to prove the fact of such inability."

In re Magen Co. Inc. (U.S.C.C.A. 2nd Cir. 1925), 7 Am. B. R. (N.S.) 283, 288; 10 Fed. (2nd) 91, the court said:

In 1909 the court decided in Re Stavrahn (C.C.A., 2nd Cir.), 23 Am. B. R. 168, 174 F. 330, 98 C. C. A. 202, 20 Ann. Cas. 888. In that case the doctrine is stated by Judge Lacombe that, if it is shown that the bankrupt was in the actual possession of a particular sum of money a few months before the turn-over order, it was incumbent on him to give some reasonable explanation as to why it was that he did not turn it over in compliance with the order requiring him so to do. In that case his sole averment was:

> 'That the reason your deponent has not turned over said sum is because he has no such sum in his possession or under his control, directly or indirectly, and has no means whatsoever of obtaining said sum of money.'

> And this court said that his averment 'is too bald, and indefinite to have any persuasive force) * * * *"

In re Reardon v. Pensoneau (U.S.C.C.A. 8th Cir. 1927), 9 Am. B. R. (N.S.) 519, 520; 18 Fed. (2nd) 244, the court said:

> "It will be observed that the court put the burden on the trustee, not on the bankrupt. This is the error in law of which complaint is made, and we think it well taken. The order of the referee and that of the court on June 7 each found that Pensoneau had the money in his possession, or under his control when the referee's order was made in April. In the circumstances the trustee could not be expected to know what had happened since the orders were made. Pensoneau, of course, knew what he had done with the $6,900. The burden was on him, and if he could not convince the court that he had lost possession and control under circumstances which he could not prevent, he should have been held in contempt. On the facts it was twice adjudged that he had the $6,900. on a named date, and on that date, the referee ordered him to turn over to the trustee. Those were not perfunctory orders. No steps have been taken to vacate them, and we know of no reason to ignore them as not valid and binding. They establish the bankrupt's possession

and control on the day the referee's order was made. The burden was on him to show what disposition had been made of the $6,900. Until that showing is made relieving him of an intentional loss of its possession and control, it must be presumed that he still has it. Remington on Bankruptcy, 3rd Ed., Sec. 2428; In re Stavrahn (C.C.A. 2nd Cir.) 23 Am. B. R. 168, 174 F. 330; In re Weber Co. (C.C.A. 2d Cir.) 29 Am. B. R. 217; 200 F. 404; Power v. Fuhrman (C.C.A. 9th Cir.) 34 Am. B. R. 418, 220 F. 787; In re Meier (C.C.A. 8th Cir.) 25 Am. B. R. 272, 182 F. 799; Good v. Kane (C.C.A. 8th Cir.) 32 Am. B. R. 19, 211 F. 956. The two cases cited brought under consideration the question of proof in support of a turn-over order. They did not involve the issue we have here, but they are in point on the presumption that possession continues in one shown to have recently held personal chattels until he removes that presumption, and that the burden is on him to do so; and that a bankrupt can not escape an order for the surrender of property belonging to his estate 'by simply denying under oath that he has it.' See also, In re Graning (C.C.A. 2nd Cir.) 36 Am. B. R. 162, 229 F. 370."

From the cases cited and the rules therein expounded, the turn-over order dated July 22, 1927 definitely established that the bankrupt had in her possession the sum of

$5,377.37 which was ordered repaid by her to her trustee. The only fact that would excuse compliance with said order would be testimony produced by her on the contempt proceeding which would show the disposition made by her of said assets since the date of the order. Albeit the original order requiring her to pay the money to her trustee may have been erroneous, said order cannot be challenged on the contempt proceeding. As stated in the opinion by this court on the former appeal:

"It constitutes a judicial estoppel."

All that the bankrupt attempted to do or did do in the hearing on the second contempt proceeding was to state, under oath, that she did not have any money belonging to the estate at the time of the referee's order or since and that she did not have any money or property with which to comply with the order and that she was unable to do so. Such a showing will not excuse her disobedience. She is judicially estopped from asserting that she did not have the money. The continued

possession of the money by her is presumed until the contrary is shown. The contrary however, was not shown or even alleged.

CONCLUSION

The bankrupt on the contempt proceeding is charged with the duty of pleading and proving the disposition of the assets found to be in her possession on the date of the Referee's order. Those assets are presumed to continue in her possession until the contrary is shown. Two hearings have been had at which not one word of testimony was produced to show the disposition of the assets which she now has in her possession.

It is accordingly respectfully requested that the District Court of the United States for the District of Oregon be directed to imprison the bankrupt for contempt for failure to obey the referee's order dated July 22, 1927.

It is impossible to speculate as to whether the coercive measures will cause compliance

with the referee's order but it is certain that the referee's order will not be complied with unless coercive measures are adopted.

Respectfully submitted,

COAN & ROSENBERG,

Attorneys for Appellant.